U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 33669009

Date: OCT. 1, 2024

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (Extraordinary Ability)

The Petitioner seeks to classify himself as "an individual of extraordinary ability in the field of Stage Construction and Engineering as it applies to Art, Theatre, and Film Production." *See* Immigration and Nationality Act (the Act) section 203(b)(1)(A), 8 U.S.C. § 1153(b)(1)(A). This first preference classification makes immigrant visas available to those who can demonstrate their extraordinary ability through sustained national or international acclaim and whose achievements have been recognized in their field through extensive documentation.

The Director of the Nebraska Service Center denied the petition. Although the Director concluded that the record does not establish the Petitioner received a one-time achievement of a major, internationally recognized award, the Director determined that, in the alternative, the record satisfies at least three of the 10 initial evidentiary criteria. However, the Director ultimately concluded that the record does not establish sustained national or international acclaim and that the Petitioner is among the small percentage at the very top of the field of endeavor. The matter is now before us on appeal pursuant to 8 C.F.R. § 103.3.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will dismiss the appeal.

I. LAW

Section 203(b)(1) of the Act makes visas available to immigrants with extraordinary ability if:

> (i) the [noncitizen] has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,
>
> (ii) the [noncitizen] seeks to enter the United States to continue work in the area of extraordinary ability, and

(iii) the [noncitizen]'s entry into the United States will substantially benefit prospectively the United States.

The term "extraordinary ability" refers only to those individuals in "that small percentage who have risen to the very top of the field of endeavor." 8 C.F.R. § 204.5(h)(2). The implementing regulation at 8 C.F.R. § 204.5(h)(3) sets forth a multi-part analysis. First, a petitioner can demonstrate sustained acclaim and the recognition of their achievements in the field through a one-time achievement (that is, a major, internationally recognized award). If that petitioner does not submit this evidence, then they must provide sufficient qualifying documentation that meets at least three of the 10 categories listed at 8 C.F.R. § 204.5(h)(3)(i)-(x) (including items such as awards, published material in certain media, and scholarly articles).

Additionally, if the criteria at 8 C.F.R. § 204.5(h)(3) "do not readily apply to the beneficiary's occupation, the petitioner may submit comparable evidence to establish the beneficiary's eligibility." 8 C.F.R. § 204.5(h)(4).

Where a petitioner meets these initial evidence requirements, we then consider the totality of the material provided in a final merits determination and assess whether the record shows sustained national or international acclaim and demonstrates that the individual is among the small percentage at the very top of the field of endeavor. *See Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010).

II. ANALYSIS

As noted above, the Director concluded the record does not establish the Petitioner received a one-time achievement of a major, internationally recognized award; however, the Director determined that, in the alternative, the record satisfies at least three of the 10 listed at 8 C.F.R. §§ 204.5(h)(3)(i)-(x). Specifically, the Director found that the record satisfies the plain language of the criteria at 8 C.F.R. §§ 204.5(h)(3)(iii), (vi), and (viii); however, the Director concluded that the record does not satisfy the criteria at 8 C.F.R. §§ 204.5(h)(3)(v), (vii), and (ix). The Director noted that the Petitioner did not assert that the record satisfies the criteria at 8 C.F.R. §§ 204.5(h)(3)(i)-(ii), (iv), and (x). The Director concluded, upon examining the evidence presented in its entirety for the final merits determination addressed in *Kazarian*, that the record does not show sustained national or international acclaim or that the Petitioner is among the small percentage at the top of the field of endeavor. *See Kazarian*, 596 F.3d at 1119-20 (citing section 203(b)(1)(A) of the Act; 8 C.F.R. §§ 204.5(h)(2)-(3)).

On appeal, the Petitioner reasserts that the record satisfies the criteria at 8 C.F.R. §§ 204.5(h)(3)(v), (vii), and (ix), in addition to the criteria at 8 C.F.R. §§ 204.5(h)(3)(iii), (vi), and (viii). The Petitioner does not assert on appeal that the record satisfies the criteria at 8 C.F.R. §§ 204.5(h)(3)(i)-(ii), (iv), or (x), thereby waiving these criteria. *See, e.g., Matter of M-A-S-*, 24 I&N Dec. 762, 767 n.2 (BIA 2009) (citing *Greenlaw v. U.S.*, 554 U.S. 237 (2008) (upholding the party presentation rule)). Moreover, the Petitioner does not assert on appeal that the record shows both sustained national or international acclaim and that the Petitioner is among the small percentage at the top of the field of endeavor. *See Kazarian*, 596 F.3d at 1119-20 (citing section 203(b)(1)(A) of the Act; 8 C.F.R. §§ 204.5(h)(2)-(3)).

Instead, on appeal, the Petitioner asserts that *Buletini v. INS*, 860 F. Supp. 1222 (E.D. Mich 1994) instructs that, upon satisfying at least three of the criteria at 8 C.F.R. §§ 204.5(h)(3)(i)-(x), "the

[P]etitioner should be deemed qualified, and the burden shifts onto [USCIS] to reject the evidence that meet the criteria, if suppose, it finds that the evidence was fraudulent or too dated and stale." The Petitioner summarizes *Kazarian* with directly conflicting statements that "[t]he Kazarian case contains no mention of a 'final merits determination' nor any discussion of what such a determination might entail" while also acknowledging, two sentences later, that "the Kazarian decision in the Ninth Circuit mentions the concept of a 'final merits determination' exactly twice."

We need not address whether the record satisfies the criteria at 8 C.F.R. §§ 204.5(h)(3)(v), (vii), and (ix), in addition to the criteria at 8 C.F.R. §§ 204.5(h)(3)(iii), (vi), and (viii) because, in any event, the Petitioner does not establish on appeal how the record shows both sustained national or international acclaim and that the Petitioner is among the small percentage at the top of the field of endeavor, which is the Director's basis for denying the Form I-140, Immigrant Petition for Alien Workers. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) (stating that agencies are not required to make "purely advisory findings" on issues that are unnecessary to the ultimate decision); *see also Matter of L-A-C-*, 26 I&N Dec. 516, 526 n.7 (BIA 2015) (declining to reach alternative issues on appeal where an applicant is otherwise ineligible); *Kazarian*, 596 F.3d at 1119-20 (citing section 203(b)(1)(A) of the Act; 8 C.F.R. §§ 204.5(h)(2)-(3)).

We first note that the Petitioner does not clarify how *Buletini*, a district court case published within the Sixth Circuit in 1994, may supersede *Kazarian*, a circuit court case published in 2010 within the Ninth Circuit—wherein the Petitioner resides. *See, e.g., Matter of K-S-*, 20 I&N Dec. 715, 718-20 (BIA 1993) (contrasting the precedential value of circuit court cases for matters arising therein from the non-precedential value of district court cases, especially district court cases within other circuits). Moreover, the *Buletini* decision does not clearly conflict with the *Kazarian* court's characterization of the adjudication process as including a final merits determination. The *Buletini* opinion indicates that the court considered the possibility that a petitioner can submit evidence satisfying three criteria and still not meet the extraordinary ability standard if USCIS provides specific and substantiated reasoning for its conclusion. *See Buletini*, 860 F. Supp. at 1234. The court in *Buletini* did not reject at any time the concept of examining the quality of the evidence presented to determine whether it establishes a Petitioner's eligibility for this highly restrictive classification.

We next note that the Petitioner mischaracterizes the extent to which *Kazarian* not only acknowledges but also articulates the requisite two steps of analysis for a request for classification as an individual of extraordinary ability under section 203(b)(1)(A) of the Act. The Ninth Circuit began by noting that a petitioner may satisfy initial evidentiary criteria by establishing receipt of a one-time achievement of a major, internationally recognized award, or through at least three of the criteria at 8 C.F.R. §§ 204.5(h)(3)(i)-(x). The Ninth Circuit continued, stating:

> If a petitioner has submitted the requisite evidence, USCIS determines whether the evidence demonstrates both a "level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the[ir] field of endeavor," 8 C.F.R. § 204.5(h)(2), and "that the [individual] has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise." 8 C.F.R. § 204.5(h)(3). Only [individuals] whose achievements have garnered "sustained national or international acclaim" are eligible for an "extraordinary ability" visa. 8 U.S.C. § 1153(b)(1)(A)(i).

Kazarian, 596 F.3d at 1119-20. In addition to acknowledging that the analysis for a request for classification as an individual of extraordinary ability entails a two-step process, specifically citing section 203(b)(1)(A) of the Act and 8 C.F.R. §§ 204.5(h)(2)-(3) as the basis for such a process, the Ninth Circuit itself declined to conduct the second step of the analysis because the individual in that case did not satisfy the first step. Specifically, the Ninth Circuit determined that the record in that case satisfied only two of the criteria at 8 C.F.R. §§ 204.5(h)(3)(i)-(x), and it concluded the following:

> Whether an applicant for an extraordinary visa [sic] presents two types of evidence or none, the proper procedure is to count the types of evidence provided (which the AAO did), and the proper conclusion is that the applicant has failed to satisfy the regulatory requirement of three types of evidence (as the AAO concluded).

Kazarian, 596 F.3d at 1122 (citing 8 C.F.R. § 204.5(h)(3)). The *Kazarian* court then declined to conduct the second part of the analysis for that case by omitting a discussion of whether the record shows sustained national or international acclaim and demonstrates that the individual is among the small percentage at the very top of the field of endeavor, because that petitioner did not satisfy the initial evidentiary requirements. *Id.*

Here, the Director found that the record satisfies the plain language of the criteria at 8 C.F.R. §§ 204.5(h)(3)(iii), (vi), and (viii). Thus, the primary issue on appeal is whether the Director erred by concluding that the totality of the evidence does not show both sustained national or international acclaim and that the Petitioner is among the small percentage at the very top of the field of endeavor. On appeal, the Petitioner does not clarify how the Director erred in concluding the record does not satisfy both of those requirements.

Black's Law Dictionary defines "sustain" as "to support or maintain, especially over a long period of time" or "to persist in making (an effort) over a long period of time." *Sustain*, Black's Law Dictionary (11th ed. 2019). In general, the record contains limited information pertinent to any particular criterion, which does not demonstrate that the Petitioner has supported or maintained any level of acclaim he may have earned in any particular capacity, especially over a long period of time. For example, the copies of published material about the Petitioner, as contemplated by the criterion at 8 C.F.R. § 204.5(h)(3)(iii), are limited to 2023 and 2024, shortly before the Petitioner filed the Form I-140, Immigrant Petition for Alien Workers; thus, they are not supported or maintained especially over a long period of time. *Se id.* The record establishes that the Petitioner published one article in 1990, as contemplated by the criterion at 8 C.F.R. § 204.5(h)(3)(vi). However, the record does not establish how publishing a single article demonstrates that the Petitioner is among the small percentage at the very top of the field of endeavor, or how he may have sustained whatever acclaim he may have garnered by publishing that article in the decades leading up to the Form I-140 filing date. Relatedly, as the Director noted, the record does not establish that any other individual in the field has cited the article the Petitioner published, indicating an absence of notoriety by virtue of having published that article. In turn, the Petitioner's leading or critical role for an organization or establishment that has a distinguished reputation, as contemplated by the criterion at 8 C.F.R. § 204.5(h)(3)(viii), appears to be limited to 2014, without evidence of how the Petitioner may have sustained any acclaim acquired thereby. *See id.*

Although the record establishes that the Petitioner has made contributions of significance to his employers over a sustained period, it does not establish how the Petitioner has made contributions of major significance in the broader "field of Stage Construction and Engineering as it applies to Art, Theatre, and Film Production," as the Petitioner described the field in question, as contemplated by the criterion at 8 C.F.R. § 204.5(h)(3)(v). We note that, on appeal, the Petitioner discusses projects unrelated to art, theatre, and film production, such as a "[u]nique engineering project for the new research station [redacted] and a "[m]obile [w]orkshop for [redacted] The record does not establish the materiality of these projects to art, theatre, and film production. Without establishing how the Petitioner's contributions are of major significance in the in the broader "field of Stage Construction and Engineering as it applies to Art, Theatre, and Film Production," beyond significance to his employers, the record does not establish how his contributions demonstrate that the Petitioner may be among the small percentage at the very top of the field of endeavor, as contemplated by the criterion at 8 C.F.R. § 204.5(h)(2).

In turn, as the Director explained, because the record does not contain probative evidence of the salaries or other remuneration of others in the field, the record does not satisfy the plain language of the criterion at 8 C.F.R. § 204.5(h)(3)(ix), contemplating "[e]vidence that the [individual] has commanded a high salary or other significantly high remuneration for services, in relation to others in the field." Moreover, without establishing whether the salary or other remuneration the Petitioner has received is high in relation to others in the field, the record also does not establish how the salary or other remuneration the Petitioner has received may demonstrate that the Petitioner may be among the small percentage at the very top of the field of endeavor, as contemplated by the criterion at 8 C.F.R. § 204.5(h)(2).

Because the Petitioner does not establish on appeal that the totality of the material provided shows both sustained national or international acclaim and demonstrates that the Petitioner is among the small percentage at the very top of the field of endeavor, the Petitioner is not eligible for the requested classification. *See Kazarian*, 596 F.3d at 1119-20 (citing section 203(b)(1)(A) of the Act; 8 C.F.R. §§ 204.5(h)(2)-(3)).

III. CONCLUSION

The evidence meets at least three of the 10 criteria at 8 C.F.R. §§ 204.5(h)(3)(i)-(x). However, the totality of the record does not support a conclusion that the Petitioner has established the acclaim and recognition required for the classification sought. *See Kazarian*, 596 F.3d at 1119-20. The Petitioner has not shown that the significance of his work is indicative of the required sustained national or international acclaim or that it is consistent with a "career of acclaimed work in the field" as contemplated by Congress. H.R. Rep. No. 101-723, 59 (Sept. 19, 1990); *see also* section 203(b)(1)(A) of the Act. The record does not otherwise demonstrate that the Petitioner has garnered national or international acclaim in the field and that he is one of the small percentage who has risen to the very top of the field of endeavor. *See* section 203(b)(1)(A) of the Act; *see also* 8 C.F.R. § 204.5(h)(2).

ORDER: The appeal is dismissed.